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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVAN ACTON SMITH, Defendant and Appellant.	H044392 (Monterey County Super. Ct. No. SS161119A)

A jury found defendant Kevan Acton Smith guilty of two counts of stalking in violation of Penal Code section 646.9[1] (counts 1 & 2) and making annoying phone calls in violation of section 653m, subdivision (b) (count 3).[2] Count 1 involved a violation of section 646.9, subdivision (a), while count 2 involved a violation of section 646.9, subdivision (b). Both offenses involved a woman whom defendant first met in August 2014 when he went to her home to purchase a vehicle that she had listed for sale on Craig's List. Defendant chose to represent himself at trial.

[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Under section 646.9, "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ." (§ 646.9, subd. (a).) Section 653m, subdivision (b), provides: "Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device, guilty of a misdemeanor."

Defendant appeals from an order granting probation. (§ 1237, subd. (a).) On appeal, defendant is represented by counsel, and he raises the following contentions: (1) the trial court's comment regarding library privileges during its *Faretta* advisement (see *Faretta v. California* (1975) 422 U.S. 806, 807, 835) violated his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution[3]; (2) his stalking conviction in count 1 must be reversed because count 1 is a lesser included offense of his stalking conviction in count 2; (3) the court should have awarded him additional custody credit and applied excess custody credit against any criminal justice administration fee (see Gov. Code, § 29550 et seq.); and (4) the two probation conditions concerning electronic devices, social media accounts, and applications were unconstitutional on their face.

We conclude that defendant's stalking conviction in count 1 cannot stand because it is a lesser included offense of his stalking conviction in count 2. Therefore, the stalking conviction in count 1 must be stricken and the assessments imposed by the trial court based on the number of criminal convictions must be corrected. Otherwise, we find no reversible error.

[3] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." Under the Fourteenth Amendment to the United States Constitution, a state may not "deprive any person of life, liberty, or property, without due process of law." Article I, section 15 of the California Constitution provides in part that "[t]he defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant" and that "[p]ersons may not . . . be deprived of life, liberty, or property without due process of law."

I

Procedural History

An information in case No. SS161119A charged defendant with two counts of stalking (§ 646.9). Count 1 of the information charged defendant with felony stalking in violation of section 646.9, subdivision (a), on or about May 28, 2016 in the County of Monterey. It was alleged that on that date, defendant "did willfully, maliciously, and repeatedly follow, and did willfully and maliciously harass JANE DOE, and made a credible threat with the intent that she be placed in reasonable fear for her safety and the safety of her immediate family."

Count 2 of the information charged defendant with felony stalking in violation of section 646.9, subdivision (b), on or about May 28, 2016 in the County of Monterey. It stated the same factual allegation and further alleged that "the defendant was subject to a temporary restraining order, injunction and other court order prohibiting the above described behavior against JANE DOE."

On November 1, 2016, the trial court granted defendant's request to represent himself.

On November 3, 2016, the trial court granted the prosecution's motion to consolidate case No. SS161119A and case No. MS343419A, which apparently charged defendant with violating section 653m, subdivision (b), on or about August 9, 2016.

On November 7, 2016, after the parties failed to reach a plea agreement, the court ruled on the People's motions in limine. The information in case No. SS161119A was orally amended to add a count charging defendant with the misdemeanor violation of section 653m, subdivision (b). Defendant indicated that he had no motions, except for a motion under section 17, subdivision (b), which the court denied. Jurors were selected and sworn.

After a jury trial in which defendant represented himself, the jury found defendant guilty of stalking in violation of section 646.9, subdivision (a) (count 1), stalking in

violation of section 646.9, subdivision (b) (count 2), and making annoying phone calls in violation of section 653m, subdivision (b) (count 3). After the jury's verdicts, the trial court found that defendant had violated probation in case Nos. MS331504A and MS332961A. It scheduled sentencing for December 13, 2016.

At the time set for sentencing, the trial court granted probation in this case and addressed defendant's violation of probation in the two misdemeanor cases. In case No. MS331504A, the trial court revoked probation, impliedly reinstated probation and expressly ordered defendant to serve a probationary jail term of 180 days with 180 days of credit for time served (consisting of 90 actual days and 90 days of conduct credit), and terminated probation. In case No. MS332961A, the court revoked probation, impliedly reinstated probation and ordered defendant to serve a consecutive probationary jail term of 120 days with 53 days of credit for time served (consisting of 27 actual days and 26 days of conduct credit), and terminated probation, effective upon completion of that probationary jail term.

In this case, the trial court placed defendant on formal probation for four years under certain terms and conditions. The court ordered defendant to serve 65 days in county jail as a condition of probation, with no credit for time served (zero days of credit) consecutive to the terms imposed in criminal case Nos. MS331504A and MS332961A.

II

Discussion

A. *Faretta Advisement as to Library Privileges*

Defendant argues that he reasonably understood the trial court's oral *Faretta* advisement, which included a comment about library privileges, as imposing a total denial of his library privileges and, consequently, the court's comment violated his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and under the California Constitution, article I, section 15. (See *ante*, fn. 3.) He further contends that he was thereby deprived of all means of presenting a defense,

which violated his constitutional right of self-representation, citing *People v. Blair* (2005) 36 Cal.4th 686, 732 (*Blair*), abrogated on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920. The People argue that the forfeiture rule applies to those claims because defendant did not raise them below and that, in any event, defendant has shown neither error nor prejudice.

1. *Background*

On November 1, 2016, the trial court discussed with defendant his request to represent himself and the *Faretta* advisement form defendant had completed. The court confirmed that the signature and initials on the form, also dated November 1, 2016, were his. Defendant affirmed that he had understood the questions that he had answered on the form.

The form cautioned that there were "many dangers and disadvantages in representing yourself" and provided some examples. On the form, defendant indicated that he understood those risks. He specified on the form that he had completed high school and had gone to college for "2 years or less." The form asked, among other things, whether defendant understood the following: "If you are in custody, your library privileges may be restricted. You will receive no extra time for preparation. You will have no staff of investigators at your beck and call." Defendant circled the answer "yes" and initialed his answer.

At the hearing, the court orally warned defendant that, by representing himself, he would be putting himself at "a real disadvantage" and "a complete disadvantage" compared to an experienced attorney who knew the court rules governing trial, the rules of evidence, and the procedures for jury selection. The court told defendant that, if he represented himself, he would "be in a real hole" and it could be "like swimming in a tank full of sharks." The court advised defendant that, if he represented himself, he would lose any right to complain about inadequate representation and he could "do more harm than good" for himself. The court emphasized that he would not be given special

treatment and he would be required "to follow all the rules just like an attorney does." The court also told defendant: "Your library privileges and investigators will not be there to help you because you're in custody, and so no investigators at your beck and call. And so, that means you'll have further restrictions in your ability to adequately represent yourself if you choose to do this."

Defendant indicated that he understood the court's warnings. Defendant confirmed that he still wanted to represent himself. The court concluded that defendant had "voluntarily, intelligently, and with full understanding as to the dangers and disadvantages of self-representation, chosen to represent [himself]" and given up his right to counsel. The court relieved defendant's counsel.

On November 7, 2016, defendant appeared in propria persona. The court addressed the People's motions in limine. When the court first queried whether defendant had any pretrial motions, defendant reminded the court that he was in jail. He said, "So I haven't been able to have any witnesses. I haven't been able to look at the case law because you, yourself, told me I can't use it at the jail." The court responded, "I did not say that." Defendant immediately replied in part, "At any rate, I feel handcuffed. I feel like I'm being railroaded into these motions . . . . I can't say anything in return. It's granted whether I like it or not. . . ." When defendant began complaining about his former counsel's failure to call the alleged victim, the trial court asked defendant whether he was making a motion to continue the trial. Defendant informed the court that he was not making such a motion. He confirmed that, aside from a motion pursuant to section 17, subdivision (b), he was bringing no other motions at that time. Defendant made no motion concerning library privileges or his access to a law library or case law.

On November 9, 2016, outside the jury's presence after the prosecutor had completed direct examination of the alleged victim and before the lunch break, the trial court informed defendant that he was required to provide his written request for any jury

instructions to the court that afternoon. The court indicated that a list of CALCRIM instruction numbers would be sufficient. When defendant indicated that he did not understand, the court explained that the instructions for criminal charges were available in "published books" and "online too." Defendant replied, "You do realize that I don't have access to any of that?" The court responded, "[O]kay. I realize a lot. But this is one of the things I warned you about of [*sic*] representing yourself. You need to know about all these things and you're going to be at a disadvantage so do the best you can. All right."

Also on November 9, 2016, at the end of the day during a discussion about the jury instructions, the defendant indicated that he had a question. He said, "I know I'm not getting any help from the library and anything but I do have a right to phone calls at the jail. . . . Nobody will let me make any phone calls. And I can't do my job if I can't get ahold of anybody. Could I get something in writing from somebody?" After the court solicited offers of proof as to four potential rebuttal witnesses, it ordered the jail to allow defendant to make phone calls to those individuals.

2. *Analysis*

As indicated, the court's library privileges comment was part of its warning of the perils of self-representation. It is noteworthy that defendant is *not* claiming on appeal that he did not validly waive his right to counsel because the court's *Faretta* colloquy included its library privileges comment.[4] (See *Faretta*, *supra*, 422 U.S. at p. 835; cf. *Blair*, *supra*, 36 Cal.4th at pp. 708-710.) Rather, defendant's contention focuses on

[4] Neither is defendant asserting that he was deprived of the constitutional right of meaningful access to the courts and suffered actual injury within the meaning of *Bounds v. Smith* (1977) 430 U.S. 817 (*Bounds*), disapproved in part in *Lewis v. Casey* (1996) 518 U.S. 343, 354 (*Lewis*), and its progeny. (See *Lewis*, *supra*, at pp. 349-351; see also *Christopher v. Harbury* (2002) 536 U.S. 403, 415, fn. 12 [constitutional underpinnings].) *Bounds* held that the constitutional right of meaningful access to the courts was assured for prisoners by access to adequate law libraries or alternative means that achieved that goal. (*Bounds*, *supra*, at pp. 830-832.)

the alleged impairment of his constitutional rights to represent himself and present a defense which allegedly resulted from the court's comment regarding library privileges.

Defendant complains that he "reasonably understood" the court's library privileges comment "to mean that he was totally barred from access to any law library resources" and that the court did not clarify what it meant when it had the opportunity. Defendant claims that the court's comment "prohibited [him] from access to the law that governed his case" and prevented him from filing any motions in limine.

In *Faretta*, *supra*, 422 U.S. at p. 807, relying upon the Sixth and Fourteenth Amendments, the United States Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so."[5] The court stated that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Faretta*, *supra*, at p. 835.)
" 'No particular form of words is required in admonishing a defendant who seeks to

[5] In *Faretta*, the United States Supreme Court concluded: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." (*Faretta, supra*, 422 U.S. at p. 819, fn. omitted.) The United States Supreme Court has expressly held Sixth Amendment rights applicable to the states under the due process clause of the Fourteenth Amendment. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [right to jury trial]; *Washington v. Texas* (1967) 388 U.S. 14, 19 [right to compulsory process]; *Klopfer v. State of North Carolina* (1967) 386 U.S. 213, 222-223 [right to a speedy trial]; *Pointer v. Texas* (1965) 380 U.S. 400, 406 [right to confrontation], *Gideon v. Wainwright* (1963) 372 U.S. 335, 341-342 [right to counsel]; see also *In re Oliver* (1948) 333 U.S. 257, 273 [right to public criminal trial].)

waive counsel and elect self-representation.' (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.)" (*Blair, supra*, 36 Cal.4th at p. 708.)

In *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443 (*Milton*), abrogated in part by *Kane v. Garcia Espitia* (2005) 546 U.S. 9, 10 (*Kane*), the Court of Appeals, Ninth Circuit, concluded that, under *Faretta*, "[a]n incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense." (*Id*. at p. 1446.) The Ninth Circuit held that "Milton's due process rights were violated when he was tried without having had any meaningful opportunity to prepare his defense" since "[d]espite timely and reasonable requests, Milton was isolated from any means to prepare." (*Id*. at p. 1445.)

Citing *Milton*, *supra*, 767 F.2d at pp. 1445-1446, the California Supreme Court stated in *People v. Jenkins* (2000) 22 Cal.4th 900, 1040, that "[i]t is certainly true that a defendant who is representing himself or herself may not be placed in the position of presenting a defense without access to a telephone, law library, runner, investigator, advisory counsel, or any other means of developing a defense." But the California Supreme also cautioned that "this general proposition does not dictate the resources that must be available to defendants" and that "[i]nstitutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense. [Citations.]" (*Ibid*.)

Subsequently, in *Blair*, the California Supreme Court stated "we have recognized that depriving a self-represented defendant of 'all means of presenting a defense' violates the right of self-representation. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1040, citing *Milton v. Morris* (9th Cir.1985) 767 F.2d 1443, 1445-1446.)" (*Blair*, *supra*, 36 Cal.4th at p. 733.) The court clarified that "[i]n the final analysis, the Sixth Amendment requires only that a self-represented defendant's access to the resources necessary to present a defense be reasonable under all the circumstances. [Citation.]" (*Ibid*.) Further, it

concluded a defendant must demonstrate prejudice to establish a constitutional violation. (See *id*. at p. 736.)

In *Kane, supra,* 546 U.S. 9 (*per curiam*), the criminal defendant who chose to represent himself "had received no law library access while in jail before trial—despite his repeated requests and court orders to the contrary—and only about four hours of access during trial, just before closing arguments." (*Ibid*.) The United States Supreme Court recognized that "[t]he federal appellate courts have split on whether *Faretta*, which establishes a Sixth Amendment right to self-representation, implies a right of the *pro se* defendant to have access to a law library. Compare [*Milton, supra*, 767 F.2d at p. 1446] with *United States v. Smith*, 907 F.2d 42, 45 (C.A.6 1990) ('[B]y knowingly and intelligently waiving his right to counsel, the appellant also relinquished his access to a law library'); *United States ex rel. George v. Lane*, 718 F.2d 226, 231 (C.A.7 1983) (similar)." (*Id*. at p. 10.) The court determined the United States Court of Appeals for the Ninth Circuit had "erred in holding, based on *Faretta*, that a violation of a law library access right is a basis for federal habeas relief." (*Ibid*.) It explained: "[I]t is clear that *Faretta* does not . . . 'clearly establis[h]' the law library access right. In fact, *Faretta* says nothing about any specific legal aid that the State owes a *pro se* criminal defendant." (*Ibid*.)

In *People v. Moore* (2011) 51 Cal.4th 1104 (*Moore*), the trial court denied the defendant's motion to reinstate his library privileges that had been revoked in a jail disciplinary proceeding. (*Id*. at p. 1124.) The defendant contended on appeal that the trial court's ruling "denied him a 'meaningful opportunity to represent himself,' in violation of the Fifth, Sixth and Fourteenth Amendments to the federal Constitution." (*Ibid*.) The California Supreme Court found no constitutional violation because the defendant's privileges had been properly restricted for "his possession of a sharpened prisoner-made weapon [that] constituted a threat to jail security" (*id*. at p. 1126) and the defendant had been "provided with other reasonable resources to present his defense,

namely, his court-appointed advisory counsel, investigator and legal runner, who had the ability to provide him with legal materials and to make telephone calls on his behalf." (*Ibid.*)

In determining that the defendant's constitutional rights had not been violated in *Moore,* the California Supreme Court noted that the United States Supreme Court had recognized in *Kane* "that the extent to which the government must provide publicly funded defense services to a self-represented criminal defendant is an open issue in that court's jurisprudence. [Citation.]" (*Moore, supra,* 51 Cal.4th at p. 1125, fn. 11.) The California Supreme Court stated: "Even to the extent that we might be inclined to revisit our reliance on *Milton,* or to consider whether . . . our state Constitution affords indigent self-represented defendants some higher level of protection than the federal Constitution, we do not do so here because . . . defendant has not shown that he was denied reasonable resources necessary to present his defense. [Citation.]"[6] (*Ibid.*)

Since defendant raised his difficulties with accessing certain legal resources more than once, we do not find that he forfeited his claims arising from the trial court's library privileges comment. But we conclude that even if the court's spoken words concerning library privileges were somewhat unclear, they were clarified by the *Faretta* form, which

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[6] In *Moore*, the California Supreme Court recognized that "other courts have reached conclusions seemingly at odds with *Milton* concerning the government's duty to provide resources for a defendant who has exercised his or her *Faretta* right. (See, e.g., *United States v. Cooper* (10th Cir. 2004) 375 F.3d 1041, 1052 ['When a prisoner voluntarily, knowingly and intelligently waives his right to counsel in a criminal proceeding, he is not entitled to access to a law library or other legal materials.']; *Degrate v. Godwin* (5th Cir.1996) 84 F.3d 768, 769; *United States v. Smith* (6th Cir. 1990) 907 F.2d 42, 44; *United States v. Pina* (1st Cir.1988) 844 F.2d 1, 5, fn. 1; *United States ex rel. George v. Lane* (7th Cir. 1983) 718 F.2d 226, 231 ['the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments']; see also *United States v. Robinson* (9th Cir.1990) 913 F.2d 712, 717 ['there is nothing constitutionally offensive about requiring a defendant to choose between appointed counsel and access to legal materials; the Sixth Amendment is satisfied by the offer of professional representation alone'].)" (*Moore, supra,* 51 Cal.4th at p. 1125, fn. 11.)

specifically stated that "[i]f you are in custody, your library privileges *may* be restricted." (Italics added.) At the time of its *Faretta* advisement, the trial court made no order compelling the jail to deny or restrict any library privileges. Further, before jury selection and less than a week after defendant began representing himself, the trial court made clear that it had *not* said that defendant could not look at case law at the jail. Defendant ignored that statement, and he did not ask the court what it meant. Under the circumstances, it was unreasonable for defendant to conclude from the trial court's oral *Faretta* advisement that it was banning him from any exercise of library privileges.

Further, defendant has not demonstrated by reference to the appellate record that the jail authorities in fact denied or restricted any library privileges. Defendant's remark on November 9, 2016 ("I know I'm not getting any help from the library . . .") did not necessarily convey that he was actually being denied access to a library. His remark also could be reasonably understood as indicating that he had access to a library but was not receiving assistance in using its materials or that the resources in the library were not helpful to him.

Since this is a direct appeal, our review is limited to the appellate record. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1183.) The appellate record in this case does not disclose what legal resources were available to defendant, and consequently we are unable to assess their sufficiency. Defendant has not demonstrated by citation to the record that he was deprived "of 'all means of presenting a defense.' " (*Blair, supra*, 36 Cal.4th at p. 733.) As indicated, defendant obtained a court order compelling the jail to allow him to make telephone calls to four prospective rebuttal witnesses. Even if defendant lacked access to some legal materials, such as, his asserted inability to access CALCRIM instructions, he has not shown resulting prejudice.

In sum, assuming arguendo that a criminal defendant who is representing himself is constitutionally entitled to legal resources reasonably necessary to his defense, under the United States constitution or the California Constitution, defendant has not

established based on the record before us that he was in fact deprived of any legal resources reasonably necessary for his defense (*Blair*, *supra*, 36 Cal.4th at pp. 734, 736) *and* suffered "resulting prejudice." (*Id*. at p. 736; see *People v. James* (2011) 202 Cal.App.4th 323, 335; see also *People v. Carter* (2010) 182 Cal.App.4th 522, 531, fn. 6 ["It is, of course, appellant's burden on appeal to present an adequate record for review and affirmatively to demonstrate error. [Citation.]"]; cf. *Lewis*, *supra*, 518 U.S. at p. 349 ["an inmate alleging a violation of *Bounds* [for denial of the constitutional right of access to courts] must show actual injury"], 351 ["Although *Bounds* itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite"].) On appeal, we presume the judgment is correct, " ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." ' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 666.)

Defendant has not shown that any constitutional right was violated by the trial court's library privileges comment, and therefore harmless-error review under *Chapman* is not warranted. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) ["[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].) Consequently, contrary to defendant's assertion, reversal is not required under *Chapman*.

B. *Count 1 was a Lesser Included Offense of Count 2*

Defendant asserts that the conviction for count 1 must be reversed and the punishment imposed on that conviction must be stricken because count 1 was a lesser included offense of count 2. "A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*).)

The appropriate remedy for conviction of both the greater offense and the lesser included offense is to strike the conviction of the lesser included offense. (See *People v. Medina* (2007) 41 Cal.4th 685, 703.)

In deciding whether multiple conviction is proper, "a court should consider only the statutory elements." (*Reed, supra,* 38 Cal.4th at p.1229; *id.* at p. 1231.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Id.* at p. 1227.) "In other words, ' "[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." ' [Citations.]" (*People v. Delgado* (2017) 2 Cal.5th 544, 570.)

As indicated, section 646.9, subdivision (a), provides that "[a]ny person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ." (§ 646.9, subd. (a).) For purposes of section 646.9, " 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose" (§ 646.9, subd. (e)) and " 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose" (§ 646.9, subd. (f)).[7]

Subdivision (a) of section 646.9 makes stalking "punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison." Subdivision (b) of section 646.9 makes stalking punishable "by imprisonment in the state prison for two, three, or four years" when the violation occurs "when there is a temporary

[7] "Constitutionally protected activity is not included within the meaning of 'course of conduct.' " (§ 646.9, subd. (f).)

restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party." Thus, the only distinction between a stalking offense punishable under subdivision (a) and one punishable under subdivision (b) is the existence of an order or injunction prohibiting a defendant's stalking behavior against the victim of the offense.

Here, both stalking charges were alleged to have occurred on or about the same date. In closing argument, the prosecutor did not distinguish between the offenses but rather told the jury that they were "exactly the same" except for the allegation of a court order in count 2.

Defendant contends that the conviction for violating section 646.9, subdivision (a), cannot stand because the offense is necessarily included within a violation of section 646.9, subdivision (b). He asserts that, consequently, the court operations assessment must be reduced by $40 and the court facilities assessment must be reduced by $30.[8] (See § 1465.8, subd. (a)(1) [$40 court operations assessment imposed on every criminal conviction]; Gov. Code, § 70373, subd. (a) [$30 court facilities assessment imposed for each misdemeanor or felony].) The People agree that the count 1 conviction must be vacated and further concede that those assessments must be reduced accordingly. That is legally correct.

C. *Custody Credits*

The probation report's primary recommendation in case No. SS161119A was that the trial court deny probation and sentence defendant. It alternatively recommended that the court suspend imposition of the sentence and place defendant on formal probation under certain terms and conditions.

[8] The trial court ordered defendant to pay "a Court Operations Assessment of $40.00 times the number of convictions for a total of $120.00" and "a $30.00 Court Facilities Assessment times the number of convictions for a total assessment of $90.00."

The probation report stated that defendant had been in the Monterey County jail from August 19, 2016 (date of arrest) through December 13, 2016 (the date of sentencing), a total of 117 actual days. By the probation officer's calculations, if concurrent sentences were imposed, defendant was entitled to 233 days of custody credit, consisting of 117 actual days and 116 days of conduct credit, in case Nos. SS161119A, MS331504A, and MS332961A.

But the probation report provided for a different allocation of custody credits if consecutive sentences were imposed. In that scenario, that report indicated that defendant should be awarded 180 days of custody credit (90 actual days plus 90 days conduct credit) in case No. MS331504A, 53 days of custody credit (27 actual days plus 26 days conduct credit) in case No. MS332961A, and zero days custody credit in this case (case No. SS161119A). At the time of sentencing, the trial court granted probation, imposed consecutive probationary jail terms in each of the three cases, and applied all of defendant's available presentence custody credits (117 actual days plus conduct credit) against the consecutive probationary jail terms imposed in case Nos. MS331504A and MS332961A.

Defendant asserts that "the trial court erred when it failed to award [him] credit for time served from the date of arrest through the date of sentencing despite the consecutive sentence imposed" because "the instant case was the but for cause of the probation violations." He impliedly invokes *People v. Bruner* (1995) 9 Cal.4th 1178, (*Bruner*) which construed the first sentence in section 2900.5, subdivision (b) ("credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted") and held that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Bruner, supra*, at pp. 1193-1194.)

The People have agreed that "there is nothing in the record that suggests [defendant's] presentence custody in his probation cases stemmed from anything other than his commission of the offenses here." Thus, they do not dispute that defendant's new offenses of which he was convicted in this case were the "but for cause" of the presentence custody at issue.

Defendant then contends that his 117 actual days of custody should have been applied against his consecutive 65-day probationary jail term imposed in this case. He maintains that this case is distinguishable from *People v. Santa Ana* (2016) 247 Cal.App.4th 1123 (*Santa Ana*). Without any citation to the record, defendant informs this court that he remained in custody for 33 days after he completed the term imposed in case No. MS332961A, impliedly because the trial court did not apply any custody credit award against the consecutive probationary term imposed in this case. He asks this court to modify the judgment pursuant to section 2900.5, subdivision (a), to "deem the criminal justice administration fee . . . to have been satisfied in full by his excess days spent in custody."[9]

The People maintain that the trial court properly awarded custody credit and that the *Santa Ana* decision is dispositive of defendant's arguments. In *Santa Ana*, *supra*, 247 Cal.App.4th at p. 1135, this court considered the second sentence of subdivision (b) of section 2900.5, which states: "Credit shall be given only once for a single period of custody *attributable to multiple offenses* for which a consecutive sentence is imposed." (Italics added.) This court determined that "where a defendant was under dual custodial restraints resulting from the defendant's arrest for one new offense and a probation hold or revocation based on only the new offense, [a single period of custody] is legally 'attributable to' both the new offense and the offense of conviction underlying the grant

[9] Probation condition No. 24 stated: "Defendant shall pay, in accordance with his/her ability to pay, the criminal justice administration fee incurred in defendant's arrest and booking in accordance with [Government Code] section 29550.1/29550.2."

of probation" within the meaning of section 2900.5, subdivision (b). (*Santa Ana*, *supra*, at p. 1137.) We concluded that "the trial court, having credited appellant for the period of custody at issue against the probationary jail term imposed in the earlier case, properly did not also credit that period of custody against the consecutive jail term imposed as a condition of probation in this case." (*Id*. at p. 1145.)

Here, the trial court's award of custody credit against the consecutive probationary terms imposed in the misdemeanor cases left no presentence custody to be credited against the consecutive probationary jail term imposed in this case. Defendant nevertheless argues that the *Santa Ana*'s construction of the second sentence of subdivision (b) of section 2900.5 was inapplicable in this case because evidence of the offenses underlying his misdemeanor convictions in case Nos. MS331504A and MS332961A were used by the prosecution in proving the harassment element of the stalking charges.[10] He suggests that since the "new case and the probation violations were related," his presentence custody was not attributable to multiple offenses within the meaning of section 2900.5, subdivision (b). He cites no authority in support of this claim.

Defendant engaged in a long course of conduct culminating in the behavior underlying his new convictions for stalking and making annoying telephone calls to the victim. The 2015 conduct underlying his misdemeanor convictions was the lead-up to his stalking behavior, which was alleged to have occurred on or about May 28, 2016. (See *ante*, fn. 10.) As stated, the "course of conduct" necessary to establish harassment within the meaning of the stalking statute is merely "two or more acts occurring over a

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[10] The probation report prepared for sentencing indicated that case No. MS331504A involved a violation of section 653m, subdivision (b) (annoying phone calls), case No. MS332961A involved a violation of section 273.6, subdivision (a) (violation of a court order), those misdemeanor offenses were committed in April and July of 2015, respectively, and the court granted probation in both cases on December 4, 2015.

period of time, however short, evidencing a continuity of purpose" (§ 646.9, subds. (e), (f)), and the harassing course of conduct must be malicious and "knowing and willful" (§ 646.9, subds. (a), (e)). The fact that evidence of his 2015 offenses was relevant and admissible in the trial of his current offenses (see Evid. Code, §§ 210, 351, 1101, subd. (b)) is not a principled reason to deviate from our analysis in *Santa Ana*.

The record indicates that the single period of presentence custody at issue was legally "attributable to multiple offenses for which a consecutive sentence [was] imposed." (§ 2900.5, subd. (b); see *Santa Ana*, *supra*, 247 Cal.App.4th at p. 1137.) We remain cognizant that section 2900.5's "purpose is not to bestow a windfall of duplicative credits. [Citation.]" (*Santa Ana*, *supra*, at p. 1144.) Defendant would receive just such a windfall under his point of view. The trial court did not err in applying custody credit.

D. *Electronic Search Conditions*

1. *Background and Contentions*

After granting probation, the trial court explained to defendant that the court was "going to impose the electronic device terms because of the harassment and stalking nature of your conduct." The court indicated that it was imposing probation conditions Nos. 12 and 13 as recommended.

Probation condition No. 12 states: "You must provide any probation officer or other peace officer access to any cell phone device or other electronic device for the purpose of searching social media accounts and applications, photographs, video recordings, email messages, text messages and voice messages. Such access includes providing all passwords to any social media accounts and applications upon request, and you shall submit such accounts and applications to search at any time without a warrant by any probation officer or any other peace officer." Probation condition No. 13 provides: "You shall not clean or delete your [I]nternet browsing activity or your social

media application history on any electronic device that you own and you must keep a minimum of four weeks of activity history."

The People assert that defendant forfeited his challenges to those probation conditions because he failed to object to them in the trial court.

2. *Governing Law*

"Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' ([*People v. Lent* (1975) 15 Cal.3d 481,] 486 [superseded by statute as stated *in People v. Moran* (2016) 1 Cal.5th 398, 403, fn. 6].) This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*).) "[T]he relevant test [under *Lent*] is *reasonableness* [citation]." (*Id*. at p. 383.)

A trial court violates the *Lent* "standard when its determination is arbitrary or capricious or ' "exceeds the bounds of reason, all of the circumstances being considered." ' [Citation.]" (*People v. Welch* (1993) 5 Cal.4th 228, 234 (*Welch*).) When a defendant claims that a probation condition is unreasonable, an appellate court will review it for abuse of discretion. (*Olguin*, *supra*, 45 Cal.4th at p. 379.) But the forfeiture rule applies to such a claim if no timely objection was interposed in the trial court. (*Welch*, *supra*, at p. 237 ["failure to timely challenge a probation condition on [*Lent*] grounds in the trial court waives the claim on appeal"].)

In addition, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition

to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Also, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.) "[A] a probation condition should not be invalidated as unconstitutionally vague ' " 'if any reasonable and practical construction can be given to its language.' " ' [Citation.]" (*People v. Hall* (2017) 2 Cal.5th 494, 501 (*Hall*).)

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 7).' [Citation.] The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.]" (*Sheena K., supra,* 40 Cal.4th at p. 890.)

In *Sheena K.*, the California Supreme Court considered whether the forfeiture rule applied to a constitutional challenge to a probation condition on its face that was raised for the first time on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at p. 878.) The court noted that "[a]n obvious legal error at sentencing that is 'correctable without referring to factual findings in the record or remanding for further findings' is not subject to forfeiture. [Citations.]" (*Id.* at p. 887.) The court created an exception to the forfeiture rule for a first-time appellate claim that a probation condition was unconstitutionally vague or overbroad on its face. (*Id.* at pp. 887-889.) The court reasoned that such a challenge presents a pure question of law that poses "an important question of law" (*id.* at p. 888) and is "easily remediable on appeal by modification of the condition." (*Ibid.*)
In reaching its conclusion, the Supreme Court observed that "review of abstract and generalized legal concepts" is a "task that is well suited to the role of an appellate court" (*id.* at 885) and a reviewing court's consideration of a facial constitutional challenge and possible modification of a probation condition determined to be unconstitutional on its face "may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law." (*Ibid.*)

In *Sheena K.*, the Supreme Court cautioned, however, that its "conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground." (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) The court recognized that some probation conditions "may not be patently unconstitutional but may suffer nonetheless from vagueness or overbreadth" and that some constitutional defects "may be correctable only by examining factual findings in the record or remanding to the trial court for further findings." (*Id.* at p. 887.) The court clarified: "[W]e do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and [forfeiture]

principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.]" (*Id*. at p. 889; see *id*. at p. 881, fn. 1.)

On appeal, a reviewing court exercises its independent judgment on a pure question of law—i.e., it engages in a nondeferential de novo review—such as, on the question whether a probation condition is unconstitutionally vague or overbroad on its face. (See *In re Edward B.* (2017) 10 Cal.App.5th 1228, 1236-1237; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

3. *Analysis*

Defendant now contends that the electronic search probation conditions are overbroad and vague in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution.[11] He concedes that he used an electronic device in the charged crimes for making phone calls and sending emails.

Defendant nevertheless asserts that the conditions were overbroad because "there was no evidence [that he] ever used social media or video recordings for any criminal purpose,", "[t]he [I]nternet and social media played no part in the case," and his use of an electronic device was "limited to phone calls and emails." He states that "[t]he only mention of social media involved a picture of a tree taken at [his] nephew's house . . . and pictures of a music festival" and that "no direct relationship exists between the use of an electronic device and the [challenged] search conditions." Defendant also contends that probation conditions are constitutionally overbroad—i.e., not narrowly tailored, in

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[11] The following issue is pending before the Supreme Court in *In Re Ricardo P.*, review granted Feb. 17, 2016, S230923: "Did the trial court err by imposing an 'electronics search condition' on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 because it would facilitate the juvenile's supervision?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2126967&doc_no=S230923&request_token=NiIwLSIkXkw4W1BRSCJdWEpJUDw0UDxTICJeIzhTQCAgCg%3D%3D> [as of Oct. 30, 2018], archived at: <https://perma.cc/TBN5-ZN68.)

violation of his First Amendment rights of free speech and privacy and Fourth Amendment rights because they do not limit the types of data that may be searched without a warrant and the conditions are "not reasonably necessary for his rehabilitation or protection of the public." He further argues that challenged probation conditions are unconstitutionally vague and overbroad because they do not define the term "electronic device" and because "they apply to 'any' cell phone or other electronic device."

Insofar as defendant is arguing that, under the particular facts of his case, the challenged probation conditions were unreasonable or overbroad, his contentions were forfeited by failing to object on those specific grounds below. (See *Welch*, *supra*, 5 Cal.4th at p. 237; *Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889; cf. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 ["A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual"].) His fact-based contentions do not present pure questions of law, despite his assertions to the contrary.

Defendant alternatively urges this court to exercise its discretion to resolve his claims on their merits even if they do not present pure questions of law. He cites *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), in which the appellate court reached a constitutional challenge to an electronics search probation condition even though the defendant had not objected below.[12] (*Id.* at pp. 297-298.)

"[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of

[12] In *P.O.*, the appellate court determined that the electronics search condition at issue in that case was reasonably related to the defendant's future criminality because it enabled probation officers to supervise him effectively (*P.O.*, *supra*, 246 Cal.App.4th at p. 295), but it concluded that the condition was unconstitutionally "overbroad in its authorization of searches of cell phones and electronic accounts accessible through such devices because it [was] not narrowly tailored to its purpose of furthering his rehabilitation." (*Id.* at p. 298.)

fundamental constitutional rights. [Citations.]" (*In re Seaton* (2004) 34 Cal.4th 193, 198.) "As the United States Supreme Court recognized in *United States v. Olano* [(1993)] 507 U.S. [725,] 731, ' "[n]o procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' [Citations.]" (*Sheena K., supra*, 40 Cal.4th at pp. 880-881.)

" 'The purpose of [the forfeiture] rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]' [Citations.]" (*Sheena K., supra*, 40 Cal.4th at p. 881.) " '[I]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46.)

We adhere to the forfeiture rule. Our review is limited to defendant's facial constitutional challenges to probation conditions Nos. 12 and 13.

We agree that the challenged probation conditions do not limit the types of searchable data, but this circumstance does not necessarily render them facially unconstitutional. "Defendant, as a probationer, has a diminished expectation of liberty and privacy as compared to an ordinary citizen. [Citation.]" (*People v. Garcia* (2017) 2 Cal.5th 792, 810.) "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citation.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.)

With respect to the Fourth Amendment challenge to the search conditions, "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*Knights, supra*, 534 U.S. at pp. 118-119.) Defendant's "status as a probationer subject to a search condition informs both sides of that balance." (*Id*. at p. 119.)

Defendant has not demonstrated, without any consideration of his individual circumstances, that the challenged probation conditions necessarily impose impermissible burdens on his constitutional rights. An assessment whether the challenged conditions were narrowly drawn to achieve the legitimate state interest of probationary supervision of defendant for his particular crimes would go beyond a review of each condition on its face.

Defendant's vagueness claim is the only facial constitutional challenge. We are mindful that "abstract legal commands must be applied in a specific *context*. A contextual application of otherwise unqualified legal language may supply the clue to . . . meaning, giving facially standardless language a constitutionally sufficient concreteness." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116.) "[N]o more than a reasonable degree of certainty can be demanded." (*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340; see *Grayned v. City of Rockford* (1972) 408 U.S. 104, 110, fn. omitted ["Condemned to the use of words, we can never expect mathematical certainty from our language"].) "A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*Olguin, supra*, 45 Cal.4th at p. 382.) As indicated, if any reasonable and practical construction can be given to a probation condition, the condition should not be invalidated as unconstitutionally vague. (*Hall, supra*, 2 Cal.5th at p. 501.)

In our view, the language "any cell phone device or other electronic device" may be given a reasonable and practical construction. Since it is used in a probation condition applicable to a specific probationer, the phrase impliedly refers to a cell phone or electronic device with a nexus to defendant—i.e., a device used by him, belonging to him, or in his possession. As to the term "electronic device," we first consider the ordinary meaning of its individual words and we then consider the term in context. The word "device" may be reasonably understood as "a piece of equipment or a mechanism designed to serve a special purpose or perform a special function <an electronic~>." (Merriam-Webster's Collegiate Dict. (2009 11th ed.) p. 342.) The word "electronic" may be reasonably understood as "implemented on or by means of a computer" or "of, relating to, or being a medium . . . by which information is transmitted electronically." (*Id*., at p. 401.) The express purposes of the probationary search conditions are to search "social media accounts and applications, photographs, video recordings, email messages, text messages and voice messages" and to search the "activity history" on social media applications and an electronic device's Internet browsers. Thus, the phrase "or other electronic device" in context impliedly refers to any "electronic device" that, like a cell phone, may be used for communicating with or contacting others (for example, through an email, text messaging, social media, or device applications), accessing the Internet, or storing or accessing verbal and nonverbal communications or information, including, for example, a desktop computer, a laptop computer, or a tablet computer. The challenged language is sufficiently concrete to survive defendant's vagueness challenge.

In sum, we find defendant's challenges to probation conditions Nos. 12 and 13 were forfeited or are meritless.

DISPOSITION

The conviction for violating section 646.9, subdivision (a) (count 1) is stricken, the court operations assessment is reduced to $80 and the court facilities assessment is reduced to $60. As modified, the order granting probation is affirmed.

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ELIA, J.

WE CONCUR:

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GREENWOOD, P. J.

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MIHARA, J.

People v. Smith
H044392